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In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

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INTRODUCTION

Respondents urge the Court to brush aside the compelling context of the Ohio Program and to focus narrowly on the scholarship component. Little is said about the intertwined socioeconomic and academic problems that Cleveland faced in the mid-1990's and that continue to plague inner-city districts across the country. Respondents instead trumpet an exclusionary approach mandated, as they see it, by *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Under respondents' view, States are disabled—due to the high percentage of religiously-affiliated schools that prevail not only in Cleveland but in much of the nation—from providing a system of genuine choice for parents who qualify under indisputably neutral criteria.

As we demonstrated in our opening brief, however, Ohio's General Assembly, with the full approbation of Governor Voinovich in 1996 and Governor Taft in 1999, responded comprehensively to the needs of Cleveland's low-income families, and fashioned a program that avails itself of virtually every tool potentially available for providing better educational opportunity. From after-hours tutoring for public school students to encouraging surrounding districts to accept Cleveland schoolchildren, Ohio has implemented common-sense, practical solutions to the seemingly intractable problems facing so many inner-city students.

To interdict Ohio's program, respondents perform elaborate, but ultimately unconvincing, contortions of this Court's considerable body of Establishment Clause law. Faced with this Court's emphasis Term after Term on the key elements of true private choice and neutrality, respondents look backward a generation ago and then, in a novel act of legal surgery, graft *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), onto *Nyquist* and

Sloan v. Lemon, 413 U.S. 825 (1973). This is classic pick-and-choose advocacy, plucking language from one setting and planting it elsewhere. It is an approach that studiously neglects this Court's neutrality and private choice teachings—teachings on which policymakers in Ohio (as well as Wisconsin and Florida) have come to rely.

If, as we maintain, Ohio's program satisfies this Court's standards for religiously-neutral programs affording true private choice, then respondents—and the Court of Appeals majority—are in error. On those twin scores, there can be no doubt that the Ohio Program passes muster: first, because program eligibility for both schools and students is determined by religiously-neutral criteria; and, second, because no state money, not one cent of Ohio funding, flows to any religiously-affiliated school without an express parental decision as to what is right for that family's child. This indispensable requirement of a prior, parental decision that is entirely unchannelled by state actors is one that respondents would cavalierly dismiss. But respondents' alternative approach of attributing to Ohio the responsibility for managing the makeup of Cleveland's private-school universe is not only counterintuitive, it tugs at this Court's contrary teachings in *Mueller v. Allen*, 463 U.S. 388 (1983). *Mueller* recognizes authoritatively that individuals in our society may, as a matter of conscience, establish religiously-affiliated elementary schools and that state benefits may flow indirectly to those schools, so long as parents freely choose their services.

In the end, respondents' eloquent calls for freedom of conscience ironically suggest results that are the polar opposite of their rigidly exclusionary approach. Put simply, States need not and should not display exclusion-driven animosity toward duly accredited private schools on the basis of religious affiliation.

ARGUMENT

This case poses a fundamental issue in the nation's struggle to improve the lifetime prospects of its school children: Whether the Constitution forbids state educators from using educational choice as a policy tool for making an immediate difference in the lives of disadvantaged students. That this tool does in fact make a difference is reflected above all in low-income parents' own assessments of the Ohio Program, *see* Brief of State Petitioners ("State Brief") at 10, and similar programs elsewhere. In-depth follow-up studies of the pioneering Milwaukee Parental Choice Program ("MPCP") conclude, for example, that choice-program parents are more satisfied in every respect with their chosen private schools than with their former public schools. *See* Brief *Amicus Curiae* of Wisconsin at 15. Milwaukee parents are far less likely to change their child's chosen school, *id.*, and much more likely to become involved in their child's education, *id.* at 16.

Like their parents, choice-program students are generally more involved in their schools. *See* Brief *Amicus Curiae* of American Education Reform Council ("AERC") at 9-10. And a mountain of evidence demonstrates that classrooms in school-choice programs are, on average, significantly more racially integrated than their public school counterparts. *See* Brief *Amicus Curiae* of Black Alliance for Educational Options at 25-26; Brief *Amici Curiae* of Center for Education Reform, *et al.*, at 26; Brief *Amicus Curiae* of Wisconsin at 16.

Parental satisfaction, student involvement, and racial integration are important, but the critical yardstick for any school is academic performance. It is significant, then, that two independent studies have measured academic gains for the (mostly low-income) Ohio Program students as compared

to their peers. *See* State Brief at 10. Studies of private, means-tested scholarship programs in New York City, Washington, D.C., and Dayton, Ohio, have similarly found academic gains from choice. *See* Brief *Amicus Curiae* of AERC at 7. And three separate studies of the Milwaukee program conclude that MPCP students' performance is as good as or better than that of their public school counterparts. *See* Brief *Amicus Curiae* of Wisconsin at 16-17. In view of such evidence, it would be troubling if the Constitution were to erect, as respondents suggest, a nearly insuperable barrier separating low-income children from the educational opportunities their more affluent peers take for granted. Nothing in the Establishment Clause demands such a socially dysfunctional result.

I. THE OHIO PROGRAM IS A RELIGIOUSLY-NEUTRAL PROGRAM OF PRIVATE CHOICE.

Both sets of respondents seek to resurrect bygone modes of constitutional inquiry. They reject, in particular, the Court's recent articulations of the principles of true private choice, governmental neutrality toward religion, and freedom of conscience. They revert instead to long-discarded notions of constitutionally-mandated hostility between religious and governmental institutions.

Even on their face, respondents' arguments are not just distinct, but somewhat contradictory. The Simmons-Harris respondents contrive a test based on a narrow reading of this Court's decision in *Witters* and a never-before-seen "*Nyquist-Sloan-Witters* trilogy." While acknowledging that the State "issue[s] tuition voucher checks to the parents of selected children," Brief for Respondents Doris Simmons-Harris, *et al.*, ("Simmons-Harris Brief") at 1, the Simmons-Harris respondents still insist that Program scholarships represent impermissible *direct* subsidies to participating

religious schools. Specifically, they allege that the structure of Ohio's program purportedly makes inevitable a flow of significant amounts of aid to schools with religious affiliations. *Id.* at 12. For the Simmons-Harris respondents, school aid programs can be neatly arranged along a continuum defined by the predominance of religious affiliations. One pole of that continuum stands within constitutional limits; the other stands outside. Tellingly, the location of the constitutional tipping-point in the vast expanse in between is nowhere defined. *Id.* at 24-25.

In sharp contrast, the Gatton respondents begin from an opposite (and equally faulty) premise—that the "automatic endorsement to religious schools" of checks initially made payable to parents produces "the parents' rubber-stamped endorsement" of tuition vouchers. Brief of Respondents Sue Gatton, *et al.*, ("Gatton Brief") at 8-9. The Gatton respondents thus insinuate that the Program's payment mechanisms are a sham for disguising direct aid to schools as indirect aid to parents. *Id.* Once the parents' tuition reaches religious schools, the Gatton respondents argue, there are no limitations on the schools' use of that tuition, and, specifically, the schools may "proselytize" participating students. *Id.* at 9-22. The Gatton respondents would reduce the Court's neutrality and private choice tests—the result of a painstaking, decades-long doctrinal advance from *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), to *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001)—to little more than "scraps of language." Gatton Brief at 33. They would then combine the fact that there is a "preponderant majority" of religiously-affiliated schools in Cleveland with their quarrels with the scholarship tuition amounts and conclude that religious teachings in religious schools are in some important sense attributable to the State of Ohio. *Id.* at 46.

Both sets of respondents largely ignore the Ohio Program's studied religious neutrality and its scrupulous protection of rights of conscience and the exercise of true, private choice. Both groups ignore, in particular, the critical distinction between school aid programs that move benefits directly from government to religious schools and those that *permit* benefits to flow to religious schools, but only indirectly and as the result of intermediate, deliberate, private, and truly independent choices of adult citizens.

Most importantly, the Program's payment mechanisms are (contrary to the Gatton insinuations) finely tailored to guarantee parental choice. These payment mechanisms prescribe that individualized scholarship payments, sent by check to participating schools but made out to Program parents, be individually endorsed over by parents to the schools. Program schools with children attending for only parts of a school year—for instance, in cases where students transfer—have their state payments "proportionally reduced." Ohio Revised Code ("R.C.") 3319.979(A)(2). These procedures ensure that schools receive payment only for services rendered and that parents are assisted in getting scholarship checks on time to their intended destinations. They track time-tested expedients used in analogous contexts—for example, the mailing of government reimbursements for medical services directly to service providers instead of indigent patients.

Aside from baseless insinuations, respondents have no answer for our emphasis on the constitutional importance of the private choices entrusted to (and made by) Cleveland parents. As varying opinions from members of this Court teach, private choices that embody citizens' own "independent discretion to put state money to religious use" serve to "break the circuit" between government and religion. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 886 (1995) (Souter, J., dissenting) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-13 (1993); *Witters*, 474 U.S. at 487; and *Mueller*, 463 U.S. at 399-400).

In a similar vein, both sets of respondents ignore the impact of the distinction between direct and indirect aid on perceptions of state endorsement of religion. As noted in our opening brief, State Brief at 21, "[i]n terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." *Mitchell v. Helms*, 530 U.S. 793, 842-43 (2000) (O'Connor, J., joined by Breyer, J., concurring); *see also Rosenberger*, 515 U.S. at 849 (O'Connor, J., concurring); *Zobrest*, 509 U.S. at 22-23 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment).

Most importantly, respondents have no answer for the fact that reasonable observers would perceive nothing biased or "sectarian" in Ohio's program, which is rooted in the legitimate, religiously-neutral identification of school districts in need of improvement; a legitimate, religiously-neutral process for approving Program schools based on secular accreditation standards and requirements for admissions and teaching, R.C. 3313.976(A)(3), (4), (6); and, ultimately, a legitimate, religiously-neutral regime of parental choice. The Program thus ensures that Ohio's "governmental involvement" with religion largely begins and "end[s] with the disbursement of funds," *Zobrest*, 509 U.S. at 22 (Blackmun, J., dissenting), and hence that no reasonable grounds exist for concluding "that government is actually endorsing religion," *id.* at 22-23.

Lacking any answer for our reliance on neutrality and private choice, respondents employ variously throughout the Gatton brief no fewer than five standards that, in their view, define the limits of the Establishment Clause. They suggest first that no funds whatsoever may flow to religious institutions. Gatton Brief at 14-16 (citing *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968)). Second, they inconsistently suggest, no *unrestricted* aid may be given. *See, e.g.*, Gatton Brief at 7. Third, they argue, *direct* aid is *per se* impermissible. *See, e.g., id.* at 17. Next, they claim that only *substantial* aid is impermissible. *See, e.g., id.* at 39. And finally, the Gatton respondents suggest aid to religious institutions is prohibited unless it results from "compensation" for service, such as payment under the G.I. Bill. *See id.* at 36-37.

All but one of these standards, as applied by respondents, may be readily dismissed. Specifically, the vocational assistance grants upheld in *Witters* were every bit as much government "funding" and every bit as "direct," "non-compensatory," and "unrestricted" as any scholarship Ohio has given to Cleveland students at religiously-affiliated schools. Acceptance of any one of four of respondents' tests would *a fortiori* overrule *Witters*, while at the same time impugning a host of established programs providing similarly direct, non-compensatory, and unrestricted funding for social services. *See* State Brief at 41.

This leaves respondents entirely dependent on their remaining test—whether aid is "substantial." But this last test is undermined, not just by *Mueller* (where ninety-six percent of benefits went to parents with children in religious schools), but also by bedrock protections for freedom of conscience. The Establishment Clause is offended where government mandates support for religion in a constitutionally relevant sense. Properly applied, this

fundamental principle poses no threat to the social services programs that respondents would put in jeopardy. But that is not because the Constitution overlooks *de minimis* intrusions on rights, as a "substantial aid" test would suggest; rather, it is because neutrality and private choice serve, in Justice Souter's phrase, to "break the circuit" between government and religion.

A. True Private Choice

Respondents' reliance on a substantial aid test dependent on changeable statistics embodying point-in-time summaries of parental choices is fundamentally incompatible with this Court's respect for rights of conscience, specifically citizens' rights to obtain social services in a religious or non-religious setting of their own choosing. This Court long ago refused "to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. *Mueller* thus declined to "consider these contentions in detail," *id.*, and in neither *Agostini* nor *Zobrest* were they determinative: "*Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school." *Agostini v. Felton*, 521 U.S. 203, 229 (1997); *id.* ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *see also Witters*, 474 U.S. at 491 n.3 (Powell, J., concurring) (Validity of the program "does *not* depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training.") (emphasis added).

The Simmons-Harris respondents nonetheless place especially heavy reliance on current statistics. They argue that the Court has only upheld programs (like *Witters*) at one pole of the religious-participation continuum, while striking down programs (like *Nyquist* and *Sloan*) at the other end. Simmons-Harris Brief at 24-25. Likewise, the Gatton respondents also rely in part on the share of aid flowing to religious institutions, Gatton Brief at 17, 36, albeit while properly conceding that even *Nyquist* itself did not turn on "statistics that might vary from year to year . . . ," *id.* at 41.

The dispositive counter to either variation on the statistics theme is that here, as in *Mueller*, public money becomes available to religious schools "only as a result of numerous private choices of individual parents of school-age children." *Mueller*, 463 U.S. at 399. No action by Ohio has determined, much less preordained, the relative participation rates of religious and non-religious schools. In fact, a recent survey showed that 80.97 percent of the private schools in Ohio were religiously-affiliated—a figure remarkably close to the eighty-two percent Ohio Program figure that respondents would blame on calculated maneuvering by the Ohio General Assembly. Brief *Amici Curiae* of Florida, *et al.*, at 16-17.

Moreover, as the lower court recognized, yearly snapshot percentages of participating religious schools and percentages of students attending those schools fluctuate considerably. *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000) (State Petitioners' Appendix ("State Pet. App.") at 5a). For instance, the number of students and schools participating in the Milwaukee program *quadrupled* shortly after the final rejection of the legal challenge to Milwaukee's program. *See, e.g.*, Brief *Amicus Curiae* of Wisconsin at 11. Given these fluctuating percentages, a given year's Program statistics—far from supplying grounds

for finding unconstitutionality—will merely reflect the aggregated results of true private choices as exercised in context of larger (but by no means religiously-motivated) programmatic events, such as the district court's injunction, the cloud of this ongoing litigation, and the implementation of the State's Community School Program.

Not deterred by evidence that Cleveland's citizenry, not Ohio's government, is responsible for the percentage of scholarship monies flowing to religious schools, respondents next offer two additional explanations for why these statistics matter. They suggest first that Ohio should have anticipated—and presumably "remedied"—the figures they find so objectionable, especially the fact that all of the public school districts adjacent to Cleveland thus far have decided against participation in the Program. Gatton Brief at 43; Simmons-Harris Brief at 31 n.12. They then suggest that Ohio—far from anticipating a certain participation profile—actually *created* this profile by offering scholarships with overly low tuition amounts. *See* Simmons-Harris Brief at 3, 30 n.11. Neither point has merit.

As noted above, the Program's share of participating religious schools closely tracks Cleveland's pre-existing religious and educational demographics. Any legislative or judicial attempt to define some purportedly more ideal religious-participation profile and then to conform participation rates to that target profile could lead only to two possible results, both unconstitutional: one-time unconstitutional gerrymandering to achieve pre-determined religious percentages; or repeated unconstitutional gerrymandering responding to religious choices that change year-to-year, and differ jurisdiction-to-jurisdiction. But as this Court made plain in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), any such "gerrymandering" would flatly violate the

Establishment Clause. *See, e.g., id.* at 729 (Kennedy, J., concurring).

That respondents' emphasis on percentages leads inevitably to unconstitutional gerrymandering is all the more evident in light of the widely varying numbers and religious affiliations of private schools across, not only Ohio,[1] but the country as a whole. *See* Brief *Amici Curiae* of Florida, *et al.*, at 15-16. Over ninety percent of private schools in Iowa, Kansas, and Nebraska are religiously affiliated, for example, but that number drops to less than fifty percent in Maine, Massachusetts, New Hampshire, Rhode Island, Utah, and Vermont. *Id.* at 15-17. These wide differences in the prevalence of religious education (and, in respondents' view, eligibility for choice-based education) demonstrate that respondents advocate an Establishment Clause at war with itself—a Clause that simultaneously forbids and requires state action aimed at diluting free citizens' pre-existing willingness to affiliate with religious institutions.

Nor do accusations of "proselytizing" add anything of significance to respondents' statistical showing. *See* Gatton Brief at 43. The relevant decisionmakers here are parents, not schoolchildren. *See* State Brief at 25-26. Because adult

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[1] The Gatton respondents skew the data pertaining to religious schools in Columbus. Specifically, they engage in an undercount, limiting artificially their tallies to Columbus schools enrolling students "in at least grades K-3," Lodging for Respondents Sue Gatton, *et al.*, Affidavit of Donald J. Mooney, Jr. at ¶ 5. This is misleading, as there is no such requirement for participation in the Ohio Program. There are five additional non-religious schools in Columbus, not counted by respondents, that serve other grades in the K-8 range and would be eligible for participation if the program were extended to Columbus under its current terms.

parents are in control, respondents entirely miss the mark with their characterizations of Cleveland's religious schools as "permeated by religious instruction and indoctrination." Gatton Brief at 43. So long as Program participation remains a matter of true, parental choice, the Program remains constitutionally distinguishable from non-choice-based programs in which religious observance is "in a fair and real sense obligatory," *Lee v. Weisman*, 505 U.S. 577, 586 (1992), or where people might be misled to think that "the State, in a school setting, in effect *required* participation in a religious exercise," *id.* at 594 (emphasis added).

Contrary to respondents' assertions, this Court has never held that the impressionability of elementary school students is relevant to Establishment Clause analysis where state *inducements* or *compulsion* with regard to religious activity are lacking and, hence, the State itself is not advancing religion. *Good News Club*, 121 S. Ct. at 2105 (discussing *Edwards v. Aguillard*, 482 U.S. 578 (1987)). Indeed, for Ohio to make program eligibility determinations by picking and choosing among duly accredited schools on the basis of whether they engage in someone's definition of "proselytization" would, far from upholding Establishment Clause principles, serve only to unleash constitutional concerns as to excessive entanglement.

Similarly misguided are respondents' suggestions, Simmons-Harris Brief at 9, 31, that we err by stressing the importance of incentives encouraging adjacent public schools to enroll Cleveland students, even though no such schools have taken advantage of this opportunity. In this regard, *Bowen v. Kendrick*, 487 U.S. 589 (1988), in the somewhat analogous setting of a challenge to the Adolescent Family Life Act ("AFLA"), reasoned that the challenge was "undercut by" the AFLA's "*facially neutral* grant requirements," plus "the wide spectrum" of both religious

and nonreligious and public and private "organizations which are *capable of* meeting" those requirements. *Id.* at 610 (emphasis added). Here, as in *Bowen*, the extension of Program eligibility to all immediately neighboring public schools "capable of meeting" applicable requirements represents an important additional badge of constitutionality. Specifically, the fact that these public schools are invited to participate on the very same terms of *independent* institutional choice as their private counterparts reconfirms the Program's commitment to strict evenhandedness, not calibrated pressures seeking preordained results. Once the cloud of this litigation dissipates, the State hopes and expects that one or more adjacent districts will take another look at the financial advantages of participating in the Program and decide to avail itself of this opportunity.

But, even today, with the participation of adjacent public schools lacking, parents' choices are in no way limited to selecting from a menu of religiously-affiliated schools. As Judge Ryan correctly explained below, Cleveland parents have numerous educational options, only one of which is to participate in the scholarship program. *Simmons-Harris*, 234 F.3d at 968 (State Pet. App. at 45a-46a) (Ryan, J., dissenting in part). Parents can also choose to enroll their child in a neighborhood public school, with or without tutorial assistance, in a magnet school, or in a community (charter) school.[2] *See id.*

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[2] The Simmons-Harris respondents seek support from the Brief *Amici Curiae* of Ohio School Boards Association, *et al.*, to argue that magnet and community schools are "illusory" alternatives to the Program. Simmons-Harris Brief at 28 n.10. In making this argument, respondents and the *amici* disregard the significant curricular differences between a magnet school and a conventional public school, and then base their derision of community schools largely on

Notwithstanding Judge Ryan's forceful arguments in this regard, respondents still have cited no evidence that any non-religious Cleveland school has ever declined to participate in the Program, let alone declined to participate because of low tuition amounts. The Simmons-Harris respondents misleadingly suggest that a recent Government Accounting Office ("GAO") study "concluded" that the Program scholarship amount is tied to the tuition of religious schools. Simmons-Harris Brief at 3. In fact, the cited GAO statement is not a "conclusion" at all, but a mere recitation of the Sixth Circuit panel majority's baseless description of the Program. The much more relevant GAO statement is the finding that *all* private schools—religious and non-religious alike—subsidize students' education on their own or with funding from outside sources. *See* GAO Rep. No. 01-914 *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* at 25 (August 31, 2001).

This point bears emphasis precisely because every other state-funded educational opportunity in Ohio is provided *entirely* at taxpayer expense, without any need for parental or other outside funding. Ohio's overall scheme thus provides strong incentives for parents to choose schools *outside the scholarship program.* Specifically, regardless of the school they choose, Program parents (unlike non-Program parents) must pay at least ten percent of their child's tuition (up to $250) either in cash or, if they lack the resources, in in-kind services. R.C. 3313.976(A)(8). Participating parents, therefore, must not only choose to apply for scholarships in the first instance, but also must make continuing financial sacrifices in order to continue to send their child to a Program school, whether religious or not. In these circumstances, any religious observance, or

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presumptions about the way parents *should*, in their view, make choices for their children.

even "proselytization," is undoubtedly "the product of free and voluntary choice by the faithful." *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

B. Religiously-Neutral Criteria

The adult parents of Program children exercise their private and independent choices within the context of a religiously-neutral scheme. As we argued at the outset, *see* State Brief at 29-31, two entirely neutral criteria determine the availability of Program benefits: a federal court order placing a school district under state control and family income. Respondents deride these critical elements of facial neutrality as "abstract," Gatton Brief at 38, but nowhere do they quarrel with the proposition that these stated criteria are religiously-neutral.

Respondents instead focus on scholarship amounts and the "educational purpose[s]" of participating schools, contending that they transform Ohio's solidly neutral regime into one that somehow "loads the scales" in favor of "religious uses," *id* at 44. In fact, unrefuted evidence shows that the Program's high levels of parental satisfaction derive largely from considerations related to foundational matters of safety, educational quality, parental involvement and the like. *See* State Brief at 10-11, 24.

Moreover, the fact that Ohio has exercised its prerogative to assign funding levels for Cleveland scholarships (in the same budgetary manner that it assigns funding for Cleveland public schools) cannot, as a matter of law, undermine the Program's neutrality. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44-55 (1973). And tellingly, whereas the Gatton respondents argue that the scholarship is a "preponderant grant[]" and thus overly generous, Gatton Brief at 44, the Simmons-Harris

respondents contradictorily claim that the amount is too stingy, Simmons-Harris Brief at 3, 30 n.11. As respondents' divided house demonstrates, there is no one "correct" scholarship amount, much less one "correct" amount that can be precisely modulated through judicial interpretation of the Establishment Clause.

In the final analysis, the religious percentages that respondents attribute to the "structure and operation" of Ohio's program, *id.* at 10, 37, existed in precisely the same measure in *Mueller*, where the Court upheld a Minnesota program that allowed ninety-six percent of tax benefits to flow to parents of children attending religious schools. *Mueller*, 463 U.S. at 401. *Mueller* described the challenged program as a means of "facilitating education of the highest quality for *all* children"—private and public school students alike. *Id.* at 395 (emphasis added) (quoting *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part)). *Mueller* emphasized (and the briefing before this Court establishes) that private school alternatives have real, positive impacts on public education; in particular, "[p]rivate schools may serve as a benchmark for public schools, in a manner analogous to the 'TVA yardstick' for private power companies."[3] *Mueller*, 463 U.S. at 395. For twenty years, middle- and upper-income students, parents, and school districts have taken advantage of *Mueller* to expand educational options and, hence, educational performance. Nothing in the Establishment Clause deprives lower-income

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[3] Studies of programs in Florida, Michigan, Arizona, and Milwaukee have documented the positive spillover effects of expanded private school availability on public school performance. *See, e.g.*, Brief *Amici Curiae* of Florida, *et al.*, at 7-8 (Florida); Brief *Amici Curiae* of Rudolph W. Giuliani and John O. Norquist at 20-22 (Milwaukee); Brief *Amicus Curiae* of AERC at 12-14.

families and communities—families and communities with much greater need—from enjoying these same opportunities through scholarship initiatives like the Ohio Program.

II. *NYQUIST* DOES NOT GOVERN THIS CASE.

While respondents continue to lean heavily on *Nyquist*, that decision addresses a much different sort of program—one self-consciously directed to improving the viability of parochial *schools* as opposed to the education of individual *students*. More troubling still, respondents' hard reading of *Nyquist* is irreconcilable with larger, deeply-rooted principles of Establishment Clause jurisprudence.

Our opening brief explains that both respondents and the Sixth Circuit majority below have consistently overlooked "the dispositive distinction that *Nyquist*'s program was intended to 'provide assistance to private *schools*,' [*Nyquist*, 413 U.S.] at 783 (emphasis added), whereas Ohio's is intended to provide assistance to public- and private-school *students*." State Brief at 43. Respondents offer no convincing responses to this crucial distinction.

Respondents do contend, as they did below, that our emphasis on the distinction between aid to *schools* and aid to *students* is inconsistent with *Nyquist*'s ruling that the challenged New York program was enacted for "secular purposes." Gatton Brief at 22 n.4. But *Nyquist* itself indicates the opposite. It makes clear that "secular purposes," as *Nyquist* uses the term, refers to governmental actors' motivations, that is, to their reasons for adopting a given educational program. *Nyquist* holds that, even when acting pursuant to secular motivations, States may not pursue secular goals through means specifically *designed* to bring parochial schools (as institutions) up to governmental conceptions of a model that will appeal to religious parents.

In other words, governments may not enact backward-looking, parochial school improvement regimes, even when prompted by ostensibly secular motivations "like preserving educational diversity, promoting free exercise of religion, and forestalling overcrowding of public schools." State Brief at 43 (quoting *Nyquist*, 413 U.S. at 764-65). Moreover, whereas respondents say that *Sloan v. Lemon* buttresses their reading of *Nyquist* (*see, e.g.*, Simmons-Harris Brief at 20-21; Gatton Brief at 41), in fact, *Sloan* turned on precisely these same distinctions. *Sloan* thus characterizes the Pennsylvania statute it invalidated as, like *Nyquist*'s New York statute, intended "at bottom" "to preserve and support religion-oriented institutions." *Sloan*, 413 U.S. at 832. There is therefore no tension, much less contradiction, between the Court's ruling in either *Sloan* or *Nyquist* and Ohio's forward-looking, much needed aid for disadvantaged students.

The importance of this critical distinction, apparent on the face of *Nyquist*, is further underscored by *Mueller*. While at first glance *Mueller*'s tax deduction program appeared indistinguishable from the tax benefit elements of *Nyquist*'s invalidated program, this Court squarely upheld the *Mueller* program based on two distinctions, both of which apply here. *Mueller* reasoned, first, as we do here, that *Nyquist*'s program sought to maintain an educational *status quo*, that is, to keep existing private-school students in their existing private-school arrangements. *Mueller*, 463 U.S. at 397, 398 (citing *Widmar v. Vincent*, 454 U.S. 253, 274 (1981)). Next, *Mueller* emphasized that *Nyquist*'s tax benefits were unrelated to the amounts actually spent by parents on tuition for their children's education; the *Nyquist* benefits were, therefore, in the nature of an "incentive" to attend private school, as opposed to a vehicle for expanding educational options. *Mueller*, 463 U.S. at 396 n.6 (citing *Nyquist*, 413 U.S. at 790). The Court accordingly drew a dispositive distinction between acceptable programs like

Ohio's, in which benefits are closely tied to the money needed to expand opportunities, and unacceptable "incentives" for private, religious schooling.

In light of these critical distinctions—and the Court's express reservation of judgment on just this case in *Nyquist*'s footnote 38—the Court need not decide whether *Nyquist* remains good law. Nevertheless, this Court's recent Establishment Clause precedents attest that *Nyquist*'s analysis has not withstood the test of time. Indeed, while respondents argue that the evolution of this Court's Establishment Clause jurisprudence has not weakened the "doctrinal footings" of its decision in *Nyquist* thirty years ago, Simmons-Harris Brief at 43, this Court has expressly said otherwise: "[O]ur Establishment Clause jurisprudence has changed significantly since we decided [*School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)] and [*Aguilar v. Felton*, 473 U.S. 402 (1985)]." *Agostini*, 521 U.S. at 236. A decision to overturn *Nyquist* at this juncture would accordingly rest on far more than "a present doctrinal disposition to come out differently from the Court of 1973." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992).

CONCLUSION

For these reasons, as well as those set forth in our opening brief, the decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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